(1) Supreme Court, U.S.
FILED
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No.

In the Supreme Court of the United States

Janet L. Lee, Petitioner

v.

Sun Life Assurance Company
of Canada

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Rule Four (4) of the Federal Rules of Appellate Procedure violate the Fifth (5) Amendment of the United States Constitution as applied in this case?

PARTIES TO THE PROCEEDINGS

The parties in this case are Janet L. Lee, domiciliary of Louisiana, and Sun Life Assurance Company of Canada, a domiciliary of Massachusetts.

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Now comes Janet L. Lee, through her Counsel of Record, and respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the district court granting summary judgment to Sun Life Assurance Company of Canada and denying summary judgment filed by Janet L. Lee is unreported. The order of the court of appeals granting the motion to dismiss the appeal under the Provisions of Rule 4 of the Federal Rules of Appellate Procedure is unreported.

JURISDICTION

The order of the court of appeals was entered on May 31, 2001. No further pleadings were filed in the court of appeal. Jurisdiction of this Honorable Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND RULE PROVISIONS INVOLVED

Rule 4 of the Federal Rules of Appellate Procedure purports to establish an absolute cut-off period for all appeals after 180 days from entry of judgment or within 7 days after the moving party receives notice of the entry of judgment, whichever is earlier. The 180 day period applies regardless of whether the moving party ever receives notice. The Fifth Amendment of the United States Constitution prohibits deprivation of property without due process of law. Due process of law requires notice and an opportunity to be heard.

STATEMENT

1. This case involves a simple factual situation. Petitioner is aggrieved by the order dismissing her appeal by a three judge panel of the Fifth Circuit Court of Appeal. That order is based upon Rule 4 of the Federal Rules of Appellate Procedure. It was entered May 31, 2001. In district court the matter was submitted to the trial judge on May 18, 2000, with each party filing a motion for summary judgment with appropriate attachments. The trial judge took the matter under advisement. The judge issued a memorandum opinion and judgment. The judgment was entered on June 30, 2000. The judgment granted a summary judgment for Sun Life Assurance Company of Canada and denied summary judgment for Janet L. Lee. The Clerk of Court for the Middle District of Louisiana did not send notice until March 30, 2001. The parties received the notice via United States mail on April 2, 2001. Neither party was expecting a quick decision in the case as the trial judge had to read substantial medical records contained in the record of the case. The thing that probably caused the mailing of the notice was a phone call from counsel for Sun Life Assurance Company of Canada. This phone inquiry as to the status of the case was made on or about March 29, 2001. On April 3, 2001, Counsel for Janet L. Lee filed a notice of appeal. On April 18, 2001, Sun Life Assurance of Canada filed a motion to dismiss the appeal of Janet L. Lee. An opposition memorandum of law was filed by Janet L. Lee. The

court granted the motion to dismiss on May 31, 2001.

2. Original jurisdiction in the Federal District Court was invoked under divinity of citizenship on January 14, 1997, when Sun Life Assurance Company of Canada filed a removal petition. The case also had a federal question under URESA.

3. The key issue before this Honorable Court is whether the Fifth Amendment is violated when a federal rule of court provides that, after the passage of 180 days after entry of judgment, the right to appeal that judgment is lost, even when no notice of entry of judgment has been given to the party seeking to appeal?

This Honorable Court, in the case of *Cafeteria and Restaurant Workers Local 473* v. *McElroy* 367 U.S. 886, 81 S. Ct. 1743, L. Ed. 2d. 1230 (1961) stated that the very nature of due process of law negates any concept of inflexible procedures universally applicable to every imaginable situation. This court has also stated that fair play is the essence of due process. See *Galvan* v. *Press* 347 U.S. 522, 74 S. Ct. 737, 98 U.S. 522, 74 S. Ct. 737, 98 L. Ed. 911 (1954). Additionally, this Court has held that valid contracts are property whether the obligor be a private citizen, city state or United States government. See *Lynch* v. *United States* 292 U.S. 571, 54 S. Ct. 840 78 L. Ed. 1434 (1934)

The present case involves a suit on a contract for disability benefits by Janet L. Lee. In *Bloom* v. *Illinois* 391 U.S. 194, 88 S. Ct. 1477, 20 L. Ed. 2d.

522 (1968) the court held that the Fifth Amendment protects citizens from federal action which would deprive the citizen of life, liberty, or property without due process of law. It is clear that the Fifth Amendment is applicable to this instant case.

Petitioner shows that she was denied due process of law by the arbitrary application of Rule 4 of the Federal Rules of Appellate Procedure where she received no notice of entry of judgment until after the 180 days set out in the rule had already run. In the case of *Knoetze* v. *United States* 634 F.2d 207, 211 (5th Cir. 1981) the court held that the Fifth Amendment due process clause attaches whenever the federal government seeks to deny a liberty or property interest.

Petitioner is being denied a property interest by the arbitrary application of Rule 4 of Federal Rules of Appellate Procedure when she never received notice of entry of judgment prior to the running of the 180 day provision of Rule 4.

In *Projert* v. *District of Columbia* 948 F. 2d. 1327, 292 U.S. App. D.C. 219 (C.A.D.C. 1991) the court held that due process, at a minimum, requires that the government provide notice and some kind of opportunity to be heard before deprivation of property interest. The notice provided must be reasonably certain to inform those affected.

Applying that principle to this case, it is obvious that the notice from the Clerk of Court of the Middle District of Louisiana informed Counsel for Petitioner only after the running of the 180 day period set forth in Rule 4 of the Federal Rules of

Appellate Procedure. Said notice was not timely and this purports to end Petitioner's right to be heard at the appellate court.

Rule 4 is an inferior law to Amendment 5 of the United States Constitution. They are both federal laws. As applied in this specific case, Rule 4 violates Petitioner's right to notice under the Fifth Amendment due process clause. That violation results in loss of a substantial right. The right of an opportunity to be heard at a reasonable time and reasonable manner in the Fifth Circuit Court of Appeal.

In *United States* v. *James Daniel Good Real Property* 510 U.S. 43, 114 S. Ct. 492 126 L. Ed. 2d. 490 (1993) the court, where the United States seized, under a federal statute, property consisting of a house and four acres of land, without notice to the owner or an adversary hearing, held that the seizure had deprived the owner of his property without due process of law.

The case law under the Fifth Amendment due process clause is uniform that an elementary and fundamental requirement of due process of law in any proceeding which is to be given finality is notice, reasonably calculated, under all the circumstances, to apprise the interested parties of the action. See *Lambert* v. *California* 355 U.S. 225, 78 S. Ct. 210 2 L. Ed. 2d. 228 (1957) and *Potter* v. *Castle Construction Co.* 355 F. 2d. 212, 215 (5th Cir. 1966) A opportunity to be heard, also a due process right, is denied when notice is not given. Thus, the heart of due process, that is fairness, is

denied to Petitioner in the precise facts of this case. In *Kaczmarczyk* v. *I.N.S.* 933 F. 2d. 588, 596 (7th Cir. 1991) the court stated "the essence of due process is that a person in jeopardy of serious loss be given notice of the case and opportunity to meet it." The court cited *Matthews* v. *Eldridge* 424 U.S. 319, 3F8. 96 S. Ct. 893, 909 47 L. Ed. 2d. 18 (1976) as authority for the quoted language. This Court held in *West Coast Hotel Company* v. *Parrish* 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1973) that the due process clause of the Fifth Amendment is a limitation or arbitrary authority and a guarantee against all unreasonable legislation which demands that all laws not be unreasonable capricious or arbitrary.

REASONS FOR GRANTING THE PETITION

The three judge panel of the court of appeal ignored Janet L. Lee's contention that Rule 4 of the Federal Rules of Appellate Procedures, as applied in this case, denied her due process of law under the Fifth Amendment. While rules of court and statutes are presumed to be constitutional; where there is a clear conflict between a rule of court or statute with the constitution, the court should not hesitate to declare that the constitution prevails. The Fifth Circuit Court of Appeal failed to do so in this case. Janet L. Lee, under that decision, has lost her right to appeal an erroneous ruling of the trial court. The erroneous ruling deprives her of disability benefits under a contract with Sun Life

Assurance Company of Canada. Janet L. Lee should not, here in America, lose her right of appeal without having received notice of the trial court's judgment. Having not received notice, until after the 180 period after entry of judgment, authorized by Rule 4 has run, deprives Janet L. Lee of an opportunity to be heard in the court of appeals.

Therefore, Rule 4 of the Federal Rules of Appellate Procedure, as applied to this case, violates Janet L. Lees due process rights under the Fifth Amendment in two (2) specific ways. First, the rule violates the requirement of due process of law that adequate notice be given. Secondly, the rule violates Janet L. Lee's due process right to be heard at a meaningful time and in a meaningful manner. It would be constitutional if the cut-off period was a reasonable period after notice. However, here the rule is clearly in conflict with the constitutional provision. The result is an arbitrary dismissal of the right to appeal, a right favored in law. Imperfection is part of the human condition. Thus, the need for redress from error in the trial courts is a honored American right.

The court of appeal failed to address the conflict between Rule 4 and the Fifth Amendment in this case. That conflict is apparent.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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August, 2001